In The Supreme Court of Bermuda

CIVIL JURISDICTION

2016: No 210

BETWEEN:-

KEEROME MAYBURY

Plaintiff

-and-

(1) KEETHA LOWE
(2) KENT LOWE
(3) THE ESTATE OF RAHIMA MUHAMMAD
(4) CLARIEN BANK LIMITED
(5) ALEX SMITH

Defendants

RULING

(In Chambers)

Date of hearing: 2nd September 2016
Date of ruling: 29th September 2016

Mr Cameron Hill, Sedgwick Chudleigh Ltd, for the Plaintiff
Mr Kevin Taylor, Taylors, for the Fourth Defendant

The First through Third and Fifth Defendants were not represented and took no active part in the hearing

Introduction

1. The hearing concerns a property known as "Cedar Knolls", 3 Port Royal Gardens, Southampton ("the Property"). The Plaintiff, Mr Keerome Maybury ("Mr Maybury"), seeks an interlocutory injunction prohibiting the Fourth Defendant, Clarien Bank Limited ("the Bank") from conveying the Property to the Fifth Defendant, Mr Alex Smith ("Mr Smith").

2. Mr Smith was joined to these proceedings at the direction of the Court because he has entered into a contract to purchase the Property. But he has not played an active role in the application and looks to the Bank to protect his interests. Irrespective of the outcome of the application, he is therefore at no risk as to costs. Neither are the First through Third Defendants, who also took no active part in the application.

Background

3. By a sale and purchase agreement which is undated, but which Mr Maybury says was made on 27th November 2014 ("the SPA"), Mr Maybury agreed to buy the Property and the First and Second Defendants and the late Mrs Rahima Muhammad ("Mrs Muhammad") agreed to sell it to him. The purchase price was $847,149.09. For ease of reference I will refer to Mrs Muhammad as the Third Defendant, even though the Third Defendant is in fact her Estate.

4. The buyer and the sellers are related. The First and Second Defendants, Ms Keetha Lowe ("Ms Lowe") and Mr Kent Lowe ("Mr Lowe"), are the children of Mrs Muhammad. Mr Maybury is Ms Lowe's son. Mr Lowe is his uncle and Mrs Muhammad was his grandmother.

5. The sellers bought the Property in 2000 with the aid of a mortgage loan from the Bank. It was a term of the mortgage that the mortgagors – ie the sellers – could not sell the Property without the Bank's written permission.

6. The mortgage fell into arrears. Mr Maybury and the mortgagors entered into negotiations with the Bank to try and resolve the situation. All parties

sought a global solution which would address the mortgage arrears in relation not only to the Property but also in relation to another property, "Aerial View", which was Mrs Muhammad's home. The solution that they came up with was that Mr Maybury would buy the Property from the mortgagors and that the purchase monies would be used to redeem the existing mortgage. Mr Maybury would borrow the purchase monies from the Bank, with the loan secured by a fresh mortgage over the Property. The amount of the mortgage loan was to be $920,000. The loan monies would also be used to complete renovations on the Property, pay the arrears of the mortgage on "Aerial View", and cover the Bank's fee.

7. Pursuant to this arrangement, Mr Maybury entered into a Credit Facility Agreement with the Bank dated 13th December 2013 ("the CFA"). Its terms included amongst others: (i) that the funds must be drawn down by not later than 30th June 2014 and that any un-drawn funds would lapse; and (ii) that prior to the disbursement of funds the Bank required, in a form and substance satisfactory to it, a signed copy of the sale and purchase agreement. It is common ground that as of 13th December 2013, and indeed prior to 30th June 2014, no sale and purchase agreement had been drawn up.

8. Confusingly, the CFA stated that Mr Maybury's acceptance had to be received on or before 20th December 2014. Mr Maybury says that this date was correct and that the draw-down date of "30th June 2014" should read "30th June 2015", whereas the Bank says that "30th June 2014" was correct, and that "20th December 2014" should read "20th December 2015". Viewing the document in its commercial context, I am satisfied that Mr Maybury's position on this point is not seriously arguable and that the Bank's position is correct.

9. Mrs Muhammad refused to sign the sale and purchase agreement prior to 30th June 2014. As no signed copy of the agreement was supplied to the Bank, and no draw-down of the funds took place, on or before that date, the Bank's offer of funding under the CFA lapsed.

10. Mr Maybury submits that, irrespective of when the CFA lapsed, it comprised or alternatively was evidence of an offer made to him by the Bank to consent

to the sale of the Property by the mortgagors to him for the amount necessary to redeem the mortgage on the Property. This offer was intended by the Bank to be capable of acceptance so as to give rise to a contract between Mr Maybury and the Bank. It was not limited by time. It did not depend upon the particular terms of the contract which Mr Maybury and the mortgagors might enter into. Neither did it depend upon Mr Maybury having available as at the date of that contract the funds to complete the purchase. Mr Maybury could accept the offer simply by entering into a contract to purchase the Property for a price sufficient to redeem the mortgage, irrespective (possibly subject to an implied term as to reasonableness) of the other terms of the contract and irrespective of whether he was at that time in a position to complete. Thus the Bank was not required to consent to the terms of the particular sale and purchase agreement which Mr Maybury entered into nor would it have a right to satisfy itself as to his financial circumstances.

11. The Bank denies having made any such offer, whether in the CFA, the course of negotiations, or at all, and contends that the express terms of the CFA represent the full extent of its contractual relationship with Mr Maybury. Ie the Bank agreed to lend Mr Maybury the money to buy the Property pursuant to the express terms of the CFA. Nothing more.

12. Mrs Muhammad proved reluctant to sign a sale and purchase agreement. It appears that she was concerned about her future housing if the deeds of "Aerial View" were not returned to her, which would not happen unless the mortgage on that property and possibly the mortgage on the Property as well were redeemed. In light of her refusal to do so the Bank, while maintaining contact with the mortgagors, decided to pursue possession proceedings against them. It resurrected an old action for possession started in 2010 rather than commence a new one, but nothing turns on that.

13. In each of June, July, August and September 2014 Mr Maybury, at the Bank's suggestion, paid $4,000 towards the mortgage on the Property. This was after the Bank communicated its decision to proceed with litigation to the borrowers. He stopped when, as he informed the Bank, he concluded

that Mrs Muhammad was not willing to sign the sale and purchase agreement. Mr Maybury states that these payments were made in the belief that the Bank's consent to the sale and purchase agreement remained in force. He submits that they constitute acceptance of the Bank's supposed offer to sell the Property to him and constitute part payment or alternatively that they give rise to an estoppel prohibiting the Bank from withdrawing the offer.

14. The Bank viewed the payments differently. Their attorneys stated in a letter dated 26th March 2015:

"*The idea was that you would begin to experience what it would be like to make regular mortgage payments. It would also demonstrate to the Bank your ability to make payments during the renovation phase, when no rental income would be coming in.*"

15. Mr Maybury relies upon an email dated 23rd June 2014 from Sharon Smith, a senior loan/mortgage officer with the Bank, to Ms Lowe as evidence that so far as the Bank was concerned its offer to him remained open:

"*My role is as Keerome's [ie Mr Maybury's] loan officer and facilitate the possibility of him borrowing funds. It was the Bank's understanding that the proposed deal to purchase Cedar Knoll's and Clear the arrears on Ariel View was accepted by all parties. I cannot comment on any conversation Mr. Veal may have had with your mother but as we all know Keerome was approved by the Bank in December of 2013 for a specific amount and attorney instructions to finalize this transaction were sent to Wakefield Quin on January 2nd. Since this time we have not received a signed Sales & Purchase Agreement and have been informed that your mother does not agree to the transaction. If anything changes I am happy to meet with Keerome and discuss other possibilities."*

16. The Bank submits that this email is simply evidence that if circumstances changed the Bank was prepared to discuss with Mr Maybury the possibility of a further loan agreement.

17. By a letter dated 16th July 2014, a local law firm instructed by Ms Lowe put forward a proposal regarding the purchase of the Property by Mr Maybury and payment by him of the mortgage arrears for "Aerial View". This proposal would form the basis of the SPA. It was the first time that the terms of what became the SPA were reduced to writing.

18. The Bank's attorneys replied by an email dated 26th July 2014. This stated that in order to properly consider the proposal the Bank would require: written confirmation that all parties were in agreement; a guarantee for the balance of the mortgage of "Aerial View"; and access to both properties and all units to determine what was required. The email added that the loan offer to Mr Maybury was outdated and that he would need to reapply.

19. The matter returned to court on 17th July 2014. It was adjourned to 14th August 2014 and again to 4th September 2014. On that date, a hearing took place before the Chief Justice at which all parties were represented by experienced counsel. Counsel for Ms Lowe and Mrs Muhammad stated that whereas there had been attempts within the family to try to reach some type of resolution so as to avoid possession orders against the Property and another property, she thought that the parties had reached a stalemate. Counsel for Mr Lowe stated that an offer made previously by the mortgagors to the Bank had not entirely been accepted but that tinkering with the detail might provide an offer acceptable to the Bank.

20. Counsel for the Bank noted that whereas the mortgagors said there was a deal and that everything would be great they could not seem to agree among themselves what the deal was. He suggested that a suspended possession order would concentrate their minds on an end date:

> "*if there is a deal that is acceptable to the Bank that they can jointly propose then fantastic and if there is not there is not*".

21. The Chief Justice made an order that the mortgagors deliver to the Bank possession of the mortgaged Property. The order was stayed until 28th November 2014. He stated:

> "*This is a mortgage possession action where the legal opposition is that an unpaid mortgagee has a right to judgment for all monies due and to obtain possession of the mortgage property. There is no legal defence other than payment. The court does routinely exercise its discretion to stay a possession order in circumstances where it is hoped even by only one party, the mortgagor, that the mortgagee may be persuaded to reach some accommodation and in those circumstances the appropriate order in my judgement is to grant [a] possession order to Mr Maybury in each case but to suspend*

that order until 28th November 2014 to allow the mortgagees a generous opportunity to resolve this matter if they can because it is possible, it seems to me, although it is doubtful, that some settlement will be reached …"

22. On 3rd December 2014 counsel then acting for Mr Maybury sent a robust email to the First through Third Defendants exhorting them to conclude the SPA. Counsel noted: "*The bank at any time can change their position and follow through with the possession of … Cedar Knolls …*" In light of Mr Maybury's case before me that was a surprising statement for his then attorney to make. Counsel for Mr Lowe and Mrs Muhammad replied by an email later that day rejecting Mr Maybury's proposal.

23. On 10th December 2014 Ms Lowe informed the Bank that on 27th November 2014, ie while the possession order was stayed, Mrs Muhammad had signed the SPA. All the other parties to the SPA had also signed it. The Bank's counsel submits that it is difficult to square the contention that Mrs Muhammad signed the SPA on 27th November 2014 with the subsequent email exchange on 3rd December 2014. However I accept that it is properly arguable that Mrs Muhammad did sign the SPA on that date.

24. The Bank's attorneys responded to Ms Lowe by an email copied to Mr Maybury and the mortgagors that without the Bank's approval the SPA was merely a waste of paper. Mr Maybury's case is that as the Bank had previously offered to consent to the sale of the Property to him, and as he had accepted that offer by entering into the SPA, no further approval from the Bank was necessary.

25. On 12th December 2014 the Bank lodged a Writ of Possession ("the Writ") with the Supreme Court Registry, which was issued by the Registry later that day. On 4th January 2015 Mrs Muhammad died. On 10th January 2015 the Writ was served on Mr and Ms Lowe. On 11th January 2015 Ms Lowe supplied the Bank with an undated copy of the SPA signed by all the mortgagors and Mr Maybury. The purchase price was expressed to be $847,149.09 including a deposit of $84,714.91. The Stakeholder for purposes of the SPA was a local law firm.

26. The SPA stated that, save where modified in the body of the agreement, it incorporated the Bermuda Bar General Conditions of Sale of January 2003. Condition 2, which is headed "*Formation*", states:

> "*The contract between the parties hereto is made when the Deposit has been paid to the Stakeholder and a complete copy of this Agreement has been signed by the last of the Vendor and Purchaser and dated.*"

No such deposit has been paid in the present case. Mr Maybury says that the requirement for one has been waived. Needless to say, the waiver was not approved by the Bank.

27. In or around March 2015 the Bank took possession of the Property. There were further discussions between the parties but they proved fruitless. By a sale and purchase agreement dated 19th February 2016 the Bank agreed to sell the Property to a third party, Mr Smith. The purchase price was $1.15 million. The Bank allowed Mr Smith to enter the Property to carry out building works prior to closure. He estimates that to date these have cost him over $107,000. He has also spent roughly $22,000 in legal fees in connection with the transaction. The Bank informed Mr Maybury of the sale at a meeting which took place in March 2016.

28. For Mr Maybury this was a bolt from the blue. He says that he had not taken any steps to protect his rights under the SPA because the family were still negotiating with the Bank in good faith to resolve the mortgage situation with respect to "Aerial View". He had no reason to think that the sale of the Property was imminent because the Property had not been marketed.

29. Mr Maybury instructed attorneys promptly, and the Bank agreed not to convey the Property without giving him prior notice. When the Bank withdrew from that agreement, Mr Maybury issued an *ex parte* summons seeking an injunction restraining the Bank from conveying the Property to Mr Smith. This came on before me on 20th May 2016. I adjourned the application with leave to restore on an *inter partes* basis, and directed that the Bank give seven clear days' notice to Mr Maybury's attorneys of any imminent or intended conveyance of the Property.

30. Mr Maybury subsequently issued a Generally Endorsed Writ of Summons seeking a declaration that the SPA is a valid and subsisting agreement and requiring the Bank to complete it.

Discussion

31. It is common ground that before granting an injunction I must be satisfied, among other things, that there is a serious issue to be tried. See, eg, American Cyanamid v Ethicon Ltd [1975] AC 396 HL *per* Lord Diplock at 407 G. Mr Maybury has failed to satisfy me on this point. Indeed, although I have every sympathy with the position in which he finds himself, I am afraid that his case appears to me to be quite hopeless. There is simply no evidence reasonably capable of supporting the existence of the offer for which he contends. The CFA does not assist him. It was an agreement to provide mortgage funding subject to certain conditions which were not complied with. The CFA lapsed when the funds which the Bank offered to lend Mr Maybury were not drawn down by 30th June 2014. The CFA does not arguably point to the existence of an offer by the Bank to enter into some other, unwritten, contract with Mr Maybury. I am satisfied that there is no arguable case that the Bank has done so.

32. The mortgage payments which Mr Maybury made towards the Property do not arguably constitute acceptance of an offer, for there was no offer, or part-performance of a contract, for there was no contract, or give rise to some sort of estoppel in Mr Maybury's favour. Neither do any of the other documents to which I was referred. Mr Maybury's position is not only without evidential foundation but is inherently implausible. It would make no commercial sense for the Bank to offer to enter into the sort of open ended agreement for which Mr Maybury contends. Taken together, these facts and matters are sufficient to dispose of this application.

33. In deference to counsel's submissions, however, I shall address briefly some of the other points raised. The Bank relied upon section 3 of the Conveyancing Act 1981 ("the 1981 Act"), which provides in material part:

"*(1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person lawfully authorized to act on his behalf.*

(2) This section shall not apply to leases or tenancies for terms not exceeding three years, nor shall it effect a contract when there has been part performance or sale by order of a court."

34. If Mr Maybury had entered into the contract which he claims to have entered into, then it would have been properly arguable that section 3 of the 1981 Act did not defeat his claim. For arguably this was not a contract for the sale or other disposition of land or any interest in land, but rather a contract to enter into such a contract. However I am extremely doubtful whether it would have been properly arguable, as Mr Maybury contended, that the mortgage payments constituted part performance of a contract for the sale of the Property as at that time Mr Maybury had not entered into any such contract.

35. The Bank also relied upon the fact that it was a term of the mortgage that the mortgagors could not sell the Property without the written permission of the Bank. But this would have been no answer to Mr Maybury's claim, at least arguably, as the terms of the mortgage deed formed no part of the quite separate contract into which, on his case, he had entered with the Bank.

36. Further or alternatively, the Bank relied upon the principle stated by Russell LJ in Duke v Robson [1973] 1 WLR 267 EWCA at 275 C:

"*In short, it seems to me that a contract for sale by a mortgagor of the equity of redemption has no possible effect on the rights and powers of a mortgagee, and in particular the rights and powers of a mortgagee to exercise his power to sell, any more than can an actual conveyance by a mortgagor, unless of course the mortgage is in the course of completion redeemed, in which case no question of a subsequent exercise of power to sell by contract by the mortgagee will arise.*"

37. Stamp LJ (at 275 H) and Roskill LJ (at 276 B) agreed. Redemption would be accomplished by payment or tender of the redemption monies to the mortgagee or payment into court. See the judgment of Stamp LJ at 275 H –

276 A. Perhaps surprisingly, Mr Maybury has not tendered payment in the instant case, although he contends that he is in a position to do so.

38. The question, as articulated by Roskill LJ at 276 B – C, would have been whether Mr Maybury were able to show that there was something which restricted or in some way cut down the power to sell which the Bank would otherwise have had as mortgagee of the Property. Mr Maybury submitted that this something was that, by reason of its alleged contract with him, the Bank had consented to the sale of the Property to him and that it sold the Property to Mr Smith without first serving him with a notice to complete. Assuming the existence of the contract for which Mr Maybury contends (although I have in fact found that the existence of such a contract is not properly arguable) then I suppose it would be arguable that in the circumstances Mr Maybury had a defence to the Duke v Robson point.

39. The Bank was under an equitable duty to the mortgagors to take reasonable precautions to obtain the "*fair*" or "*true market value*" of the Property at the date of sale. See Silven Properties Ltd v Royal Bank of Scotland [2004] 1 WLR 997 EWCA at para 19. Lightman J (as he then was), giving the judgment of the Court, stated at para 19:

> "*He must take proper care whether by fairly and properly exposing the property to the market or otherwise to obtain the best price reasonably obtainable at the date of sale.*"

40. Mr Maybury submitted that in selling the Property to Mr Smith the Bank had failed to comply with this duty. Eg the Property had not been marketed and the sale price was lower than the price stated in a valuation obtained by Mr Maybury. I need not consider the merits of that argument as it goes not to whether the sale to Mr Smith should be permitted to proceed but rather to the amount of purchase monies payable by the Bank to the mortgagors. Mr Maybury further submitted that in relation to the sale the Bank had acted in bad faith or from an improper motive. Suffice it to say that he did not make out an arguable case on this point although the position may change once discovery has taken place.

41. Had I found that there was a serious issue to be tried, I would likely have concluded that whereas damages would have been an adequate remedy for the Bank, were the Court to grant an injunction and the Bank to succeed at trial, it was difficult to tell whether they would have been an adequate remedy for Mr Maybury or Mr Smith, were either party to "lose" the injunction application but succeed (or in Mr Smith's case, were the Bank to succeed) at trial.

42. I would therefore have gone on to consider the balance of convenience. The principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. See National Commercial Bank of Jamaica v Olint Corpn [2009] 1 WLR 1405 PC per Lord Hoffmann at para 17. Applying that test, I should have granted an injunction, as this would have enabled the Property to pass to either Mr Maybury or Mr Smith depending on the outcome at trial. Mr Smith undertook work on the Property prior to completion at his own risk: if he suffered loss as a result then any remedy he might have had would have lain against the Bank.

43. In the event, and for the reasons given above, as I am not satisfied that there is a serious issue to be tried the application for an injunction is dismissed.

44. I shall hear the parties as to costs.

DATED this 29th day of September, 2016

_____

Hellman J